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In the Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA, APPELLANT

v.

ANTHONY L. FABRIZIO

On Appeal from the United States District Court for the Western District of New York

BRIEF OF THE STATE OF NEW HAMPSHIRE AS *AMICUS CURIAE* PRIOR TO CONSIDERATION OF THE JURISDICTIONAL STATEMENT

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INTEREST OF THE *AMICUS CURIAE*

The full effective operation of the Sweepstakes Commission of the State of New Hampshire will inevitably be affected by the disposition of this appeal. Consequently, the State of New Hampshire has an interest which is legitimately to be considered prior to such disposition. In support of that interest, the following argument is offered in opposition to the Jurisdictional Statement as submitted by the appellant.

ARGUMENT

On October 5, 1965, the district court, on motion of appellee before trial, dismissed an indictment which charged that the appellee carried in interstate commerce seventy-five acknowledgements of purchase for a sweepstakes race of the State of New Hampshire. The district court based its dis-

missal of the indictment on the ground that the carrying of such acknowledgements was not within the purpose of Section 1953, Title 18, United States Code, as disclosed in the legislative history of the Act. Cf. *United States v. Kelly*, 328 F.2d 227. In support of its decision, the district court looked to the legislative history of the Act and evidently found in it no indication of a purpose by the Congress to interfere with the conduct by an agency of the government of a State, in pursuit of a legitimate State end, and solely within the confines of the State, of a sweepstakes operation. The intention of the State of New Hampshire, in organizing and operating its sweepstakes, was to aid the development of the educational system of the State. A similar operation has received preliminary approval by the legislature of the State of New York.

In organizing its sweepstakes, the State of New Hampshire provided for a number of safeguards which would insulate the operation from conflict with any of the laws of the United States. Noteworthy among these safeguards were the provisions that the entire operation be conducted within the State of New Hampshire, and that no necessary element in the operation be involved in interstate commerce. These factors provide so substantial a basis for the district court's dismissal of the indictment that they deserve consideration by this Court prior to any disposition on the merits.

The grounds proposed by the district court in dismissing the indictment form a substantial basis for the affirmance by this Court of that dismissal. But even if this Court were, at this time, to judge differently, the case would still demand full consideration by this Court of the many cogent grounds which exist for that dismissal. Such consideration would be both proper and timely, and would be wholly independent of any facts which might be produced by the Government at trial. In support of this position, and in point-by-point opposition to the grounds argued in the Government's Jurisdictional Statement, we submit the following:

1) Implicit in the language and in the legislative history of the Act is a purpose to combat organized crime. Section 1953 purports to prohibit and to penalize persons conducting certain described gambling activities in interstate commerce. It does not purport to prohibit and to penalize all gambling, nor to prohibit or to limit interstate travel for the purpose of going to a State to engage in a gambling activity which is lawfully permitted in that State. Thus, it is of course permissible to travel to Nevada for the sole purpose of shooting craps, or to travel to any State for the purpose of attending the races and placing bets.

As stated in the Government's Jurisdictional Statement, the question is presented whether an indictment lies under Section 1953 for carrying in interstate commerce what is nothing more than an acknowledgement of the fact that the appellee had lawfully travelled to New Hampshire and had lawfully purchased sweepstakes tickets there. It was in New Hampshire, to which the appellee had lawfully travelled, that the appellee lawfully consummated a lawful act of gambling. The question, therefore, answers itself: the purpose and generic prohibition of the Act, as clearly disclosed by its title, is "to provide means for the Federal Government to combat interstate crime and to assist the States in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia."

The prohibition is directed against the carrying of some kind of paraphernalia which is an integral and operative part of an unlawful gambling enterprise. But the acknowledgements of purchase are no such thing. As mere indications of a lawfully completed gambling act, they create no rights in the holder, cannot be negotiated, and need not be presented in order to obtain payment of a prize — and all this is stated on the face of the acknowledgement. The bet having been placed, an act of gambling is complete.

missal of the indictment on the ground that the carrying of such acknowledgements was not within the purpose of Section 1953, Title 18, United States Code, as disclosed in the legislative history of the Act. Cf. *United States v. Kelly,* 328 F.2d 227. In support of its decision, the district court looked to the legislative history of the Act and evidently found in it no indication of a purpose by the Congress to interfere with the conduct by an agency of the government of a State, in pursuit of a legitimate State end, and solely within the confines of the State, of a sweepstakes operation. The intention of the State of New Hampshire, in organizing and operating its sweepstakes, was to aid the development of the educational system of the State. A similar operation has received preliminary approval by the legislature of the State of New York.

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On the face of the Act, the requirement is that the prohibited paraphernalia be "adapted, devised, or designed for use" in the offending gambling enterprise, which, in this case, according to the Government's claim, is a wagering pool conducted by the State of New Hampshire. But these acknowledgements are specifically *not* designed for use in the gambling enterprise. We submit that the acknowledgements are no more "wagering paraphernalia" as defined by the Act and as described in its legislative history than is the dollar "bill" that John Doe carries back from Las Vegas after a game of blackjack. For if the language of the Act is given the all-embracing meaning attributed to it by the Government, the currency of the United States, a draft on a bank, or a traveler's check fall equally under the prohibition of the Act.

It is evident that there are no grounds for the inference that the Congressional purpose was to enact what would amount to federal law against gambling. Even if the Congress possessed the power to enact such a law, there would be serious reason to question the existence today of the kind of "moral" purpose which might, at one time, have motivated the Congress to attempt to do so, under the Interstate Commerce clause or otherwise. Cf. *Lottery Case,* 188 U. S. 320. When the Government speaks of a wide casting of the "net of liability", it takes a position which is tantamount to an assertion that this purpose existed and was translated into the language of Section 1953. We submit that there is no warrant whatever for the extension of this so-called "net of liability" in such a way as to entangle and to thwart an educational-revenue-operation like the New Hampshire Sweepstakes which was enacted by the Legislature of, and is being administered with scrupulous safeguards by an agency of the State of New Hampshire after the enactment by Congress of Section 1953 of Title 18, United States Code.

2) The Government, in its Jurisdictional Statement, has so construed the exceptions provided in the Act as to

carve out a uniquely privileged field for pari-mutuel betting and state-sanctioned betting. The Government argues that "if betting materials were freely transportable from states where they were legal to those where they were illegal, the public policy of the latter states would be undermined." Here, however, we do not have the situation of state-sanctioned betting but of state-operated betting. Neither do we have the situation of interstate transportation of betting materials, since, as has been shown, all elements integral to the betting procedure are retained within the sponsoring state. In short, the Government has construed the exceptions in the strictest possible fashion and has given no weight to the absence of any conscious prohibition in the Act of anything related to a lawful gambling enterprise. The specific exceptions clearly illustrate that state-sanctioned gambling operations were to be immune from the penalties imposed by the Act itself.

3) There is no need to dispute the Government's contention that the draftsmen of Section 1953 were familiar with sweepstakes or with lotteries. We submit that a substantial difference in kind exists between the conduct of a sweepstakes by a gambling syndicate or by a private individual, and the conduct of a sweepstakes by one of the States of the Union. It must be seriously questioned whether there was any intent by the Congress to enact a law which would treat both operations in the same way and would make criminal what is otherwise legitimate revenue-raising activity by one of the States. Here again, it must be questioned whether the purpose of the Congress was to foster the suppression of the act of gambling, wherever it exists, rather than simply to control and to penalize the explicitly and notoriously interstate operations of syndicated gambling. Yet this would be the net effect of the Government's construction of the Act. We submit, further, that the "peculiar attributes of the New Hampshire Sweepstakes," referred to by the Government, have already been shown to exempt that sweepstakes from the coverage of the Act.

4) We have also shown that there is no need for further marshaling of facts, appropriately the province of the trial court, to demonstrate that the acknowledgements of purchase were neither used nor designed for use in the sweepstakes, but were merely incidental to the sweepstakes, and performed no necessary or integral function within the sweepstakes. And even if it were to be decided that they were "used" or "designed for use", we have shown that this was not a use in conjunction with "a wagering pool with respect to a sporting event" which was within the purview of the Act. Consequently, there is no need for a trial to dispose of this point.

CONCLUSION

The judgment of the district court should be affirmed, or, probable jurisdiction having been noted, the case should be set down for briefs and oral argument on the merits of the district court's dismissal of the indictment.

Respectfully submitted,

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February 1966.